Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-43

In re Applications of

SUNSHINE BROADCASTING, INC. File No. BPH-870625MI

HARTSVILLE BROADCASTING CO., INC. File No. BPH-870629NC

For Construction Permit for
New FM Station, Channel 253A,
Hartsville, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1992; Released: January 17, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is a Petition for Reconsideration of our *Decision*, 6 FCC Rcd 5981 (Rev. Bd. 1991), filed by Sunshine Broadcasting, Inc. (Sunshine). Sunshine claims that the Board failed to address one of its exceptions and also made "an erroneous finding" pertaining to diversification of media interests. Sunshine's petition is opposed by the prevailing applicant, Hartsville Broadcasting Co., Inc. (HBC).

2. It will be recalled that Sunshine was disqualified in our *Decision* because (1) it was not financially qualified at the time it filed its application, and (2) was not currently financially qualified. Further, after a full comparative analysis, the Board determined that even if qualified, Sunshine could not prevail over HBC on a comparative basis, *see* 6 FCC Rcd at 5982-5983, and the proceeding would otherwise require a remand with a transmitter site suitability issue specified against Sunshine. *Id.*, at 5983.

3. Petitions for reconsideration will not be entertained where an applicant has presented no new facts or changed cirumstances as required by 47 CFR § 1.106(b)(2), nor will reconsideration be granted for the purpose of reviewing matters that have been considered. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1985). *See WWOR - TV, Inc.*, 5 FCC Rcd 7656 (1990); *Royce International Broadcasting*, 6 FCC Rcd 2601 (1991). Nevertheless, although the matter raised here was considered as not decisionally significant, we will address Sunshine's resurrected argument.

4. Sunshine claims, again, that HBC "should be disqualified for presenting an inchoate ownership interest." Petition at p. 1. Sunshine alleges that two HBC minority shareholders (Betty Wiggins, 16.7% ownership interest), and her husband (J. L. Wiggins, 19.5% ownership interest), "made commitments to divest their interests in HBC to an unknown person or persons should HBC's Hartsville application be granted." *Id.*, at p. 2.

5. In opposition, HBC points out that the Presiding Officer had already considered these arguments in the hearing proceeding below, and that (Opposition at p. 2):

> Betty and J.L. Wiggins, together holding 36% of HBC's stock, own 100% of a twice-weekly newspaper, *The Hartsville Messenger* ("*The Messenger* "). In its March 12, 1990 Integration Statement HBC pledged that "all ties with *The Messenger* would be severed" so that no principal of HBC would also be a principal of *The Messenger*. Thus, HBC promised there would be no overlapping ownership or interest between the Hartsville station and the newspaper. HBC did not specify whether that split would result from the Wigginses' divestiture of their HBC stock or their stock in the newspaper, thereby allowing them the flexibility to decide just how to effectuate the pledge. Thus, Sunshine's statement that the Wigginses "made commitments to divest their interests in HBC to an unknown person or persons" is false. However, as of their May 1990 depositions, the Wigginses' intent was to effectuate their pledges by divesting their stock in HBC rather than the newspaper. In fact, shortly thereafter, J.L. Wiggins did transfer his HBC stock to his adult son and resign his position as a director of HBC. That fact was timely reported to the Commission. *See Order*, FCC 90M-1665 (released June 14, 1990).

And, as HBC further explains: "Actually, J.L. Wiggins had already transferred his 19.5% interest in HBC to his adult son, but since that transfer occurred after the "B" cut-off date, HBC is attributed with his interest." *Id.*, at n. 2.

6. Noting that Sunshine had previously raised this matter only two days before commencement of the hearing,[1] HBC recounts that Sunshine's Motion (*id.*, at pps. 2-3):

> to the ALJ to dismiss HBC's application on the basis that the Wigginses' divestiture pledge renders the identity of some of HBC's voting stockholders unknown. The ALJ properly rejected that argument outright. *See Memorandum Opinion and Order*, FCC 90M-3234 (released October 15, 1990). There is no Commission requirement that Mrs. Wiggins obtain prior Commission approval before disposing of her 16.7% stock interest in HBC. The only regulatory requirement (outside of filing a Section 1.65 amendment if HBC's FM application is still pending) would be for HBC to report the change in its annual ownership report, a fact the ALJ recognized in denying Sunshine's motion. *Id.*, ¶ 3.

7. In support of its contentions, Sunshine again (as it did before the ALJ) relies upon *Azalea Corp.*, 47 FCC 2d 151 (Rev. Bd. 1973) (subsequent history omitted) (Section 1.65 "reporting issue" specifically added; applicant failed to produce any evidence thereunder; application denied).[2] Additionally, although Sunshine did not previously raise, nor rely upon, the Board's order in *Palmetto Communications Co.*, 6 FCC Rcd 2193 (Rev. Bd. 1991) (released some two months prior to the time Sunshine filed its exceptions here), it now attempts to further bolster its position,

claiming that, as in *Palmetto*, "no one knows who will own a significant portion of the voting stock of HBC when its station goes on the air." Petition at p. 3. However, like *Azalea*, *Palmetto* does not support Sunshine's position. In *Palmetto*, Robert Rickenbacker, one of two "50%/50%" general partners of a licensee seeking modification of its existing station facility, disclaimed *any* ownership interest in the applicant. The other 50% general partner claimed Rickenbacker *did* have such an interest. Since the ownership of the applicant was disputed by both partners, we held that we would not award the construction permit "to whom it may concern" and remanded the case for a hearing on (1) whether the applicant lacked candor and/or misrepresented facts regarding its ownership structure and (2) whether it had violated 47 CFR § 1.65 by failing to report the ownership dispute.

8. Unlike *Palmetto*, there is no raging dispute here over the true composition of the applicant or a potential misrepresentation issue. Fully reported was the prior transfer of J. L. Wiggins' 19.5% interest to his son. *See Order*, FCC 90M-1665, released June 14, 1990. Even should Betty Wiggins transfer her 16.7% interest, no adverse consequences are triggered under Commission rules, since an applicant may transfer up to 50% of its ownership after filing without forfeiting its position. 47 CFR § 73.3571(j)(2); *see also Sound Broadcasting Co.*, 6 FCC Rcd 3627 (Rev. Bd. 1991). Indeed, not only has HBC *not* been aided by these actual (or potential) ownership changes, it has received no integration credit for the ownership share of the Wiggins' and it has been charged with a diversification demerit for their other media interests, notwithstanding the actual (or potential) ownership changes in HBC. No prejudice has befallen Sunshine,[3] and no occasion arises for any issue, reporting or otherwise.

9. Sunshine next claims that it "should be declared the comparative winner" here, because (Petition at pps. 3-4; emphases added):

> Reconsideration is also requested on the basis that *the Board's reduction* of the effect of *The Messenger* on the diversification analysis because its owners are not to be integrated into the radio station operation is contrary to Commission policy. The Board cited no precedent for such holding. As Sunshine pointed out in its exceptions, it is solely ownership which determines the diversification assessment. The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), makes it clear that diversification and integration are separate criteria; diversification is based strictly upon ownership, not whether that ownership will be integrated into operation of the station. To the degree that the Board's diversification analysis and comparative conclusions *were based on this misstatement of policy*, reconsideration should be granted . . . .

10. In our *Decision*, 6 FCC Rcd at 5983, we noted that the ALJ assessed a "very slight diversification demerit" for the ownership interests of Mr. and Mrs. Wiggins. Thereafter, we merely posited that "even if we were to, at best, slightly *increase HBC's* diversification demerit and modestly *decrease* the same demerit awarded *Sunshine*, HBC, on balance, would still clearly prevail on the all-important diversification factor." *Id.*, at para. 15. Sunshine's argument in this regard is without merit.

11. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed by Sunshine Broadcasting, Inc., on November 22, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] HBC observes that "Sunshine's motion was not filed until two business days before the hearing, although the facts upon which it was based were known to Sunshine three-and-a-half months earlier. Sunshine's only explanation for its gross lack of diligence was that it previously had not been aware of the principle allegedly enunciated in the 15-year-old *Azalea* [*Corp.*, 47 FCC 2d 151 (Rev. Bd. 1973)] decision upon which it premised its argument." Opposition at n. 3.

[2] In *Azalea*, when a 20.83% stockholder of Azalea Corporation, Dr. Francis England, died, Azalea failed to amend its application to report either England's death or the disposition of his stock. Thus, a 47 CFR § 1.65 "reporting issue" was specifically added against Azalea. At the remand hearing, Azalea did not introduce *any* evidence on the issue. The ALJ concluded that its failure to introduce evidence regarding the disposition of Dr. England's stock constituted a failure to carry its burden of proof under the specified issue, disqualified Azalea, and the Board affirmed. Thus, *Azalea* is inapposite here. Indeed, no "Section 1.65" issue has ever been sought by Sunshine, nor was such an issue specified against HBC, and there has been no failure of proof warranting its disqualification. Sunshine argues that the absence of a "reporting issue" is "not material," maintaining Azalea was "dismissed" because the identity of the owner of Dr. England's stock was unknown, and that if the case had been resolved on the basis of the reporting issue, Azalea's application would have been "denied." However, as HBC notes, "Sunshine does not cite the language allegedly 'dismissing' the Azalea application, and, in actuality, Azalea's application was *denied*. *See Azalea*, 47 FCC 2d at 160 (¶¶ 12 and 15). That denial resulted from Azalea's failure to meet its burden of proof under the Section 1.65 issue, leading to its disqualification. *Id.* at 152, 154." Opposition at p. 4.

> And, as HBC observes (*id.*, at pps. 4-5):
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> Moreover, *Azalea* did not involve a divestiture pledge but actual present ownership of a stock interest. In *Azalea*, Dr. England's stock interest had transferred upon his death, whereas here Mrs. Wiggins' intent to sell her stock is contingent not only on grant of HBC's FM application but also upon her continued ownership of stock in *The Messenger*. In other words, if Mrs. Wiggins and her husband were, for some reason, to sell *The Messenger* before HBC's FM station went on the air, she might very well retain her stock in HBC. Thus, as the ALJ stated in denying Sunshine's motion to dismiss, "even a cursory reading of *Azalea* makes clear that the facts in *Azalea* bear not even the slightest relationship to the facts in the instant case." *Memorandum Opinion and Order*, FCC 90M-3234 at ¶ 3.

[3] Should any HBC stock be transferred, *e.g.*, to a party holding other media interests, even after the award of the permit, this would constitute a change in "core circumstances" requiring a reevalution of the comparative analysis, *were* Sunshine to be reinstated. *Crosthwait* v. FCC, 584 F.2d 550 (D.C. Cir. 1978); *W.S. Butterfield Theatres v. FCC,* 231 F.2d 552 (D.C. Cir. 1956); *Enterprise Co. v. FCC,* 231 F.2d 708 (D.C. Cir. 1955), *cert. denied,* 351 U.S. 920 (1956).